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In the Supreme Court of the United States

OCTOBER TERM, 1996

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY, PETITIONER

v.

SCIOTO WATER, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the service area protections of Section 306(b) of the Consolidated Farm and Rural Development Act of 1961 (7 U.S.C. 1926(b)), which are afforded to entities that have obtained loans from the Farmers Home Administration under that Act, apply after the obligation has been reacquired by the debtor under terms discharging the loan.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-10a) is reported at 103 F.3d 38. The order of the district court (Pet. App. 11a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet App. 1a) was entered on December 18, 1996. The petition for a writ of certiorari was filed on March 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 306(a)(1) of the Consolidated Farm and Rural Development Act (Rural Development Act),[1] Pub. L. No. 87-128, 75 Stat. 308 (7 U.S.C. 1926(a)(1)), authorizes the Secretary of Agriculture "to make or insure loans to associations, including * * * public and quasi-public agencies," for certain types of projects to be undertaken "primarily [for] serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents." The purposes for which federal financial assistance may be provided under Section 306(a)(1) include projects for "the conservation, development, use, and control of water." Subsection (b) of Section 306 (7 U.S.C. 1926(b)) provides that the service areas of those associations that have received federal loan assistance under Section 306(a) may not be curtailed or limited by other public entities, or by franchises issued to private entities, "during the term of such loan."[2]

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[1] Section 306 was originally enacted as part of Title III of the Agricultural Act of 1961, Pub. L. No. 87-128, 75 Stat. 308. Section 301 of that statute provided that Title III may be cited as the "Consolidated Farmers Home Administration Act of 1961." 75 Stat. 307. By Section 101(a) of the Rural Development Act of 1972, Pub. L. No. 92-419, 86 Stat. 657, Congress revised the name of Title III to the "Consolidated Farm and Rural Development Act."

[2] Section 306(b) provides:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis

Section 116 of the Rural Development Act of 1972, Pub. L. No. 92-419, 86 Stat. 661-662, amended the Consolidated Farm and Rural Development Act by, among other things, adding a new Section 309A (7 U.S.C. 1929a). Section 309A(a) (7 U.S.C. 1929a(a)) created the Rural Development Insurance Fund to "be used by the Secretary as a revolving fund for the discharge of obligations of the Secretary under contracts guaranteeing or insuring rural development loans." That provision defines "rural development loans" as including loans issued under Section 306(a) of the Rural Development Act.

b. Section 1001(a) of the Omnibus Budget Reconciliation Act of 1986 (OBRA), Pub. L. No. 99-509, 100 Stat. 1874 (7 U.S.C. 1929a note), directed that "[t]he Secretary of Agriculture, under such terms as the Secretary may prescribe, shall sell notes and other obligations held in the Rural Development Insurance Fund established under section 309A of the Consolidated Farm and Rural Development Act [7 U.S.C. 1929a] in such amounts as to realize net proceeds to the Government of not less than" certain prescribed sums for the fiscal years 1987 through 1989.

OBRA Section 1001 was amended on January 6, 1988, by Section 803 of the Agricultural Credit Act, Pub. L. No. 100-233, 101 Stat. 1714, which added subsections (f) and (g) to Section 1001. Subsection (f) provides that before selling notes or other obligations under Section 1001, the Secretary shall first give the issuer of the note or obligation the opportunity to

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of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

purchase it. Subsection (g) provides that Section 306(b) of the Rural Development Act shall be applicable to notes or other obligations sold or intended to be sold under Section 1001.[3]

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[3] Subsections (f) and (g) state in pertinent part:

(f) Right of First Refusal.—

(1) In General.—Before conducting a sale of a portfolio of notes or other obligations under this section, the Secretary of Agriculture shall—

(A) determine whether the issuer of any unsold note or other obligation desires to purchase the note or other obligation; and

(B) if so, hold open for 30 days, an offer to sell the note or other obligation to the issuer at a price to be determined under paragraph (2).

(2) Determination of Offering Price.—

(A) Authority.—The Secretary of Agriculture shall determine, in accordance with subparagraph (b), the price at which a note or other obligation shall be offered for sale under this subsection.

(B) Price.—Such price shall be determined by discounting the payment stream of such note or other obligation at the yield on the then most recent sale of the portfolio, adjusted for changes in market interest rates, servicing and sales expenses, and the maturity and interest rate of such note.

* * * * *

(g) Applicability of Prohibition on Curtailment or Limitation of Service.—Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section.

2. On January 10, 1989, the Farmers Home Administration (FmHA)[4] issued a notice to FmHA community programs borrowers announcing a Discount Purchase Program (DPP) for FmHA borrowers and providing information about that program.[5] The notice was titled "Important Information Concerning Your Opportunity to Prepay Farmers Home Administration Loan at a Discount." SWI App. 35a. The notice stated that loans sold under the DPP would only be sold directly to borrowers, "and any loan purchased at a discount will be stamped 'Satisfied in Full.'" *Id.* at 42a. The notice referred to the purchase price to be paid by a borrower purchasing its loan under the DPP as being the "final payoff." *Id.* at 41a, 45a, 51a, 52a.

3. Petitioner is a regional water district that has operated in Scioto County, Ohio, since 1966. In the late 1960s and early 1970s, petitioner issued several million dollars in bonds to FmHA pursuant to Section 306 of the Rural Development Act. Pet. 5. In 1989, petitioner participated in the DPP by purchasing all of its FmHA-held debt at a discounted amount. Pet. 7; Pet. App. 5a, 13a. As petitioner acknowledges (Pet. 15 n.8, 27, 28), FmHA marked petitioner's bonds as "paid in full" when petitioner purchased them in 1989. Petitioner financed the reacquisition of its FmHA

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[4] FmHA was at the time the agency within the Department of Agriculture charged with administering the Rural Development Act and associated programs. FmHA was the predecessor to the agency now known as the Rural Economic and Community Development Service. For convenience, this brief employs the designation "FmHA."

[5] A copy of the January 10, 1989, notice is reproduced at pages 35a-54a of the appendix to the brief in opposition filed by respondent Scioto Water, Inc. (SWI App.).

debt by issuing new bonds through a non-federal entity. Pet. 7; Pet. App. 5a, 13a.

4. Petitioner commenced this suit against respondents Secretary of Agriculture, *et al.*, and Scioto Water, Inc. (SWI) in 1995. Petitioner alleged, among other things, that it was entitled to the service area protections set out in Section 306(b) of the Rural Development Act and that certain actions being undertaken by SWI, a private, nonprofit water supply corporation, were in violation of Section 306(b). Petitioner further asserted that the federal parties were violating Section 306(b) by extending financial assistance to SWI. Petitioner sought injunctive relief. Pet. App. 95a, 100a-102a.

SWI moved to dismiss the complaint. Petitioner moved for partial summary judgment on the Section 306(b) issue and the federal parties likewise moved for summary judgment on that issue. Pet. App. 11a.

The district court, finding that petitioner had failed to state a claim for relief under Section 306(b), granted the motion to dismiss. In accordance with that disposition, the court denied petitioner's motions for injunctive relief and for partial summary judgment as moot. Pet. App. 26a.

5. The court of appeals affirmed. Pet. App. 2a-10a. The court of appeals concluded that the service area protections afforded by Section 306(b) remain effective only for the duration of the loan, and that because petitioner's Rural Development Act loan was discharged when petitioner purchased that loan through the DPP, the Section 306(b) protections to which petitioner had formerly been entitled were no longer in effect. In the court's words (Pet. App. 10a):

> We note that cases brought in federal court under [Section 306(b)] have consistently emphasized the requirement of federal indebtedness to obtain [Section 306(b)] protection. When an issuer buys back its own bond and cancels the debt, however, it no longer qualifies as a debtor for [Section 306(b)] protection. * * *

The court of appeals distinguished *City of Grand Junction* v. *Ute Water Conservancy District*, 900 P.2d 81 (1995) (Pet. App. 27a-66a), in which the Colorado Supreme Court ruled that a Section 306(a) borrower remained entitled to the protections of Section 306(b) after repurchasing its loan from FmHA. The court below reasoned that the *Ute Water* transaction had been specifically and intentionally structured by FmHA and the debtor so as not to discharge the previously-issued debt instrument. In contrast, petitioner's bonds, which had been marked "paid in full," had been discharged. Pet. App. 9a-10a.

ARGUMENT

The decision of the court of appeals is correct, is not in conflict with any other federal or state court decision, and presents no recurring issue of law warranting review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner asserts (Pet. 29) that "[OBRA] Section 1001(g) plainly and unambiguously states congressional policy that the service area protections [of Section 306(b) of the Rural Development Act] are to continue for the term of any notes sold or even intended to be sold under OBRA, whether the sale is to a third party or to the debtor district." OBRA Section 1001(g), however, does not so state. Rather, Section 1001(g) states that "Section 306(b) of the

Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b) shall be applicable to all notes or other obligations sold or intended to be sold under this section." Thus, OBRA Section 1001(g) provides only that notes and obligations sold under that section are governed by Section 306(b) of the Rural Development Act.

Section 306(b), in turn, establishes certain service area protections, but it expressly makes those protections applicable only "during the term of [the] loan." See *Glenpool Utility Services* v. *Water District No. 2*, 861 F.2d 1211, 1216 (10th Cir. 1988) (the "right * * * [conferred by Section 306(b)] is not permanent, but contingent upon the district's outstanding federal debt"), cert. denied, 490 U.S. 1067 (1989). Hence, under Section 306(b), the service area protections of that provision terminate when the loan itself comes to an end. Here, as the court of appeals concluded, petitioner's FmHA loan was discharged when petitioner purchased that loan through FmHA's Discount Purchase Program and its bond was marked "paid in full."[6]

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[6] As the Sixth Circuit noted, while they do not address the specific issue presented here, "cases brought in federal court under 7 U.S.C. § 1926(b) have consistently emphasized the requirement of federal indebtedness to obtain" protection under the Rural Development Act. Pet. App. 10a. See, *e.g.*, *North Alamo Water Supply Corp.* v. *City of San Juan*, 90 F.3d 910, 915 (5th Cir.) (noting that "[e]very federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations"), cert. denied, 117 S. Ct. 586 (1996); *City of Madison* v. *Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987) (noting that 7 U.S.C. 1926(b) provides "[a] bright-line rule" protecting water associations indebted to FmHA "throughout the FmHA loan term").

2. The court of appeals correctly recognized (Pet. App. 9a-10a) that its decision here is not in conflict with the Colorado Supreme Court's decision in *Ute Water Conservancy District*, *supra*. In *Ute Water*, the question was whether Congress intended to afford service area protection in the case of "reacquisition by an issuer of a bond held by the FmHA, *where the parties intended not to discharge the bond.*" 900 P.2d at 91 (Pet. App. 52a) (emphasis added). After reviewing relevant federal statutes, the Colorado court expressly stated that, for the service area protections of Section 306(b) to remain applicable, "the FmHA loan must be outstanding." 900 P.2d at 90 (Pet. App. 50a). The court noted that the transaction in which the *Ute Water* debtor reacquired its FmHA bond had not actually discharged the subject bond because the transaction had been specifically and intentionally structured by the participants so as to avoid discharge of the obligation. *Id.* at 86 (Pet. App. 39a-40a).[7] The court held (*id.* at 92 (Pet. App. 53a)) that OBRA Section 1001(g) "authorized the FmHA to sell all notes or other obligations without removing the protection provided to rural districts under section 1926(b), including selling the * * * bond back to the issuer when the parties intended that the bond remain outstanding." Accordingly, the *Ute Water* court stated that the Section 306(b) service area protections

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[7] The water conservancy district in *Ute Water* apparently structured its reacquisition of the FmHA bond in a manner allowing that debt to remain outstanding in order to preserve the ability to resell the bond in the future. 900 P.2d at 86 (Pet. App. 39a-40a).

would remain in effect until the bond was actually discharged. 900 P.2d at 97 (Pet. App. 66a).[8]

Here, in contrast, the court of appeals found that petitioner's bonds had been discharged, as evidenced by the fact that those bonds had been marked "paid in full" and no further obligation to FmHA remained. Pet. App. 10a. That holding is not in conflict with *Ute Water*.

3. Petitioner asserts (Pet. 27) that because the district court resolved this case on the basis of a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6), the court of appeals acted improperly by looking beyond the face of the complaint in concluding that petitioner's bonds had been discharged. An appellate court, however, may affirm a district court's judgment on any basis in the record, see *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982), and Federal Rule of Civil Procedure 12(c) provides that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Since petitioner itself moved in the district court for summary judgment on the Section 306(b) issue, and the federal parties cross-moved for summary

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[8] Given the *Ute Water* court's finding that FmHA and the debtor water district had structured their loan purchase agreement so as not to discharge the subject bond, any language in that opinion that might be read as suggesting that Section 306(b) service area protections could continue in effect even upon the discharge of the underlying bond would be *dicta*.

judgment on that question, petitioner was afforded a reasonable opportunity to submit all materials pertinent to that issue. Notably, although respondents distinguished the *Ute Water* decision in the proceedings below on the basis that *Ute Water* involved a purchase agreement that did not discharge the underlying bond, petitioner did not contend that its own bonds had not been discharged. Rather, petitioner argued that under OBRA Section 1001(f) and (g), it remained entitled to Section 306(b) service area protections irrespective of whether its debt was discharged at the time it purchased the bonds from FmHA. Hence, petitioner should not now be heard to contend that the court of appeals acted improperly by finding that petitioner's bonds, unlike the bond in *Ute Water*, had been discharged. In any event, that narrow procedural issue does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

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